

Consequently, the ALJ denied claimant's request for workers compensation benefits.

Claimant argues it was natural that he did not initially realize he had injured his back at work because his symptoms began gradually on September 21, 2009, and progressively worsened over the course of the next several days as he continued to pull and maneuver trash bins. Moreover, claimant argues that K.S.A. 44-508(d) establishes September 29, 2009, (the date that claimant's back problems were diagnosed as being work-related) as the earliest possible date of accident for this cumulative trauma claim and notice was given to respondent on the 10th day when excluding weekends. Accordingly, claimant argues that using an accident date most favorable to respondent results in timely notice.

Alternatively, claimant argues that if the Board finds he was injured in a single event on Monday, September 21, 2009, then notice was not given within 10 days but it was given well within the 75 days allowed by the Workers Compensation Act when 'just cause' exists. And claimant maintains he had just cause for failing to provide immediate notice of the injury to respondent as he did not realize he had sustained a work-related injury until consulting with his personal doctor. In short, claimant requests the Board to find claimant's accident arose out of and in the course of his employment with respondent and that respondent had timely notice of the accident. In addition, claimant requests the Board to authorize additional medical treatment with Dr. Eliason and commence temporary total disability benefits effective September 30, 2009.

Respondent contends the preliminary hearing Order should be affirmed. First, respondent contends claimant does not know what caused his current back condition as he had experienced back problems in the past and, therefore claimant has failed to prove his back problems were caused by work. Second, respondent maintains claimant failed to provide timely notice of the alleged accident as claimant's last day of work for respondent was September 24, 2009, and claimant allegedly did not provide notice of the accident until October 13, 2009, which is well beyond 10 days of either September 21 or 24, 2009. Next, respondent contends there was no just cause to extend the notice period to 75 days as claimant knew he was required to report immediately any accident he sustained at work. And, finally, respondent argues claimant is not entitled to an award of temporary total disability benefits as he is capable of working and is unemployed for reasons other than his alleged injury.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?;
2. If so, did claimant provide respondent with timely notice of the accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Undersigned Board Member finds as follows:

Claimant is 33 years old and was employed by respondent, the City of Olathe, for approximately six years and last worked as a heavy equipment operator and truck driver in its commercial solid waste division. Claimant's job duties included welding and driving several different type of trucks used for hauling refuse—a front load truck, roll-off trucks, and dump trucks. Claimant estimates that in September 2009 he spent 95 percent of his time picking up trash bins with a front load truck.

Claimant's job operating the front load truck required him to exit the truck 15 to 20 times per day to clean the corrals holding the large waste containers and positioning the containers so they could be lifted by the forks located on the front of the truck. At the end of the day, claimant climbed into the back of the truck and shoveled it out.

Claimant testified he began noticing low back symptoms in mid to late September 2009. He could not pinpoint when his low back symptoms began, but he remembers one specific incident in which he felt some minor discomfort in his back while maneuvering a container. Over the next several days, claimant's symptoms progressively worsened. Claimant attributes the increased symptoms to pulling on the large waste bins.

Claimant believes the incident he specifically recalls occurred on Monday, September 21, 2009. Despite worsening symptoms, claimant continued to work through Thursday, September 24, 2009. The next day, claimant advised respondent that he was not feeling well and, therefore, he was not coming into work. On Monday, September 28, 2009, claimant again called into work to advise he was not coming in. During this call, however, claimant advised his supervisor, Donnie Morrison, that his back was hurting. Claimant indicated he did not relate his symptoms to work in that conversation as he was then unsure of their cause. Mr. Morrison advised claimant to see a doctor.

On Tuesday, September 29, 2009, claimant consulted his personal physician, Dr. Christine Eliason. Claimant testified he told the doctor he did not know what was causing his back pain but that his pain was worsening. The medical records from the September 29, 2009 appointment with Dr. Eliason indicate claimant had slowly worsening lower back pain that began approximately two weeks earlier. Those records contain the handwritten note, "No known injury – drives a truck for a living & pulling stuff out of truck."² In addition,

² P.H. Trans., Ex. 1 at 1 (Sept. 29, 2009 note).

the records reveal claimant had a “10 hx of back injury– occ back pain – never lasted very long.”³ The doctor prescribed medications and low back stretching exercises.

Claimant next saw Dr. Eliason on October 8, 2009. The records from that visit note that “original injury @ work – pulling stuff off of truck.”⁴ Those records also indicate the doctor recommended that claimant follow-up with his employer about workers compensation.

On October 13, 2009, claimant prepared a written injury report. Claimant contends respondent initially received notice that his back symptoms were related to work on September 29, 2009, when claimant spoke to Mr. Morrison following his appointment with Dr. Eliason. He contends the accident report was not completed until October 13, 2009, as that is the date respondent requested him to come in. In completing the injury report, claimant wrote:

I was pulling out a container and strained my back. I worked with pain for 2 weeks in hopes of it going away. But that never happened. Now I’m seeking medical attention for my injury.⁵

Claimant noted the date of injury as September 2009. Moreover, in a part of the report that was not completed by claimant, the report indicates claimant did not give notice of the injury until that day.

On October 14, 2009, claimant gave a telephone interview to David Sandberg of CCSMI Workers’ Compensation. In that interview, claimant indicated that before he first saw Dr. Eliason he had informed his supervisor that his back symptoms were related to work.

Claimant saw Dr. Eliason on October 28, 2009, for the third and final time regarding his present symptoms. The medical notes indicate they had been waiting for a reply from “work-comp” for approximately three weeks.

In late December 2009, claimant was evaluated by Dr. Michael J. Poppa at his attorney’s request. The doctor noted that claimant began experiencing low back pain in August 2009 due to lifting at work. Moreover, the doctor noted that claimant had informed his employer of his pain complaints on September 1, 2009, and that claimant was terminated on September 24, 2009. Dr. Poppa concluded claimant had not reached

³ *Id.*

⁴ *Id.* at 2 (Oct. 8, 2009 note).

⁵ *Id.*, Resp. Ex. A.

maximum medical improvement for a work-related back injury. The doctor wrote, in pertinent part:

1) Mr. Harris has not reached maximum medical improvement regarding his work related injury, which occurred 9/1/09 – 9/24/09 while employed by City of Olathe involving his lumbar spine (musculoligamentous sprain-strain/intervertebral disc injury with lower extremity radiculitis/piriformis syndrome/pain). Mr. Harris notified his employer of his work related conditions but was never sent for any medical care or treatment under workers' compensation. Due to persistent pain, he was seen by his family physician who recommended his participation in a physical therapy program, however, this was denied by work comp. Currently Mr. Harris has residuals involving his back and lower extremity secondary to his work related injury.

2) Mr. Harris' work related injury and employment at City of Olathe was the direct and proximate cause of his resulting work related injury with residuals involving his lumbar spine. This injury occurred during the course and scope of his employment. His employment did cause or substantially contribute to his present conditions, as well as the need for treatment, which he received.⁶

This record contains evidence that claimant's injury occurred as the result of a single, traumatic event as well as evidence that it occurred as a result of cumulative trauma. Claimant, who is not the best historian, provided testimony that could be construed either way. Dr. Poppa, who provided the only medical expert opinion to date, indicates that claimant's injury is in the nature of a cumulative trauma. At this juncture, the undersigned finds that although claimant remembered a specific event in late September 2009 that caused him minor discomfort, when considering the entire record and the nature of claimant's job, it is more probably true than not that claimant's back symptoms developed gradually as the result of cumulative trauma. Accordingly, claimant's back injury should be treated as a repetitive trauma injury rather than a single, traumatic event.

The Workers Compensation Act gives injured workers 10 days to notify their employer of the accidents they sustain on the job. But that period is extended to 75 days when there is just cause to provide notice within that 10 days.⁷ The ALJ announced at the preliminary hearing that the parties had stipulated the date of accident for this alleged series of injury was September 24, 2009.

⁶ *Id.*, Ex. 2 at 3-4 (Dr. Poppa's Dec. 29, 2009 report).

⁷ See K.S.A. 44-520.

The undersigned finds claimant has established by a preponderance of the evidence that he provided respondent with notice of his back injury as early as September 29, 2009, or as late as October, 8, 2009. And both dates are within 10 days, excluding weekends, of the last day that he worked for respondent. Claimant's testimony is credible that he was initially uncertain of the source of his low back symptoms. That is reflected in Dr. Eliason's medical records. There is no reason to doubt claimant's testimony that he discussed the cause of his symptoms with Dr. Eliason and that they concluded that his work was the most likely cause of his symptoms. Likewise, there is no reason to doubt that claimant then telephoned his supervisor and relayed that information. And should that telephone conversation have occurred on October 8, 2009, that is still within 10 days of when claimant last worked for respondent.

In summary, the undersigned Board Member finds claimant sustained personal injury by accident arising out of and in the course of his employment with respondent and, moreover, that he provided respondent with timely notice of his accidental injury. Accordingly, this claim should be remanded to the ALJ to further address claimant's request for benefits.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, the undersigned reverses the findings of Judge Hursh and finds that claimant is entitled to receive workers compensation benefits for his low back injury. Accordingly, this claim is remanded to the ALJ to reconsider claimant's requests for temporary total disability benefits and medical benefits in light of the findings above.

IT IS SO ORDERED.

Dated this _____ day of May 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge

⁸ K.S.A. 44-534a.